Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

HONAS RICHARDS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Sixth Circuit erred when it held, in conflict with numerous other courts, that *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957), abrogated the proximate cause rule of *Davis* v. *Wolfe*, 263 U.S. 239 (1923), in cases arising under the Federal Employers' Liability Act, and thereby overruled *sub silentio* decades of Supreme Court precedent.

PARTIES TO THE PROCEEDINGS

All parties are listed in the caption.

RULE 29.6 STATEMENT

Petitioner Consolidated Rail Corporation ("Conrail") is a jointly owned subsidiary of CSX Corporation and Norfolk Southern Corporation, both of which are publicly traded corporations.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Consolidated Rail Corporation ("Conrail") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is reported at 330 F.3d 428 (6th Cir. 2003), and is reproduced in the Petition Appendix ("App.") at 1a-15a. The judgment of the United States District Court for the Southern District of Ohio is not officially reported. It can be found at 2001 WL 1681107 (S.D. Ohio Sept. 10, 2001), and is reproduced at App. 16a-27a.

JURISDICTION

The judgment of the Sixth Circuit was entered on May 28, 2003. App. 1a. The Sixth Circuit denied rehearing en banc on July 17, 2003. App. 28a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES OR OTHER PROVISIONS INVOLVED

Relevant portions of the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, and the Federal Safety Appliance Act, 49 U.S.C. §§ 20301-20306, are reproduced at App. 29a-32a.

STATEMENT OF THE CASE

In *Davis* v. *Wolfe*, 263 U.S. 239 (1923), this Court reconciled a number of its prior precedents under the Federal Employers' Liability Act ("FELA") involving allegations of injuries caused by a railroad's violation of the Federal Safety Appliance Act ("SAA"). This Court held that "an employee

cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury." *Id.* at 243. The Sixth Circuit has now held that this rule, which had previously been followed in that court, "no longer is good law" after *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957). App. 14a. The Sixth Circuit had no authority to trench upon this Court's exclusive prerogative to determine the continuing validity of its precedents. Moreover, its decision is based upon a fundamental misconception of *Rogers* that is the source of a mature conflict among the federal courts of appeals and state supreme courts. *Rogers* has been interpreted by some courts, including the court below, as having instituted a new test of legal causation under FELA (and thereby overturning *sub silentio* decades' worth of this Court's prior precedents), while other courts have concluded that *Rogers* did not change the longstanding proximate cause standard.

The question presented—*viz.*, the standard of causation under FELA—is an issue of fundamental importance. This Court has not squarely addressed FELA causation in the nearly 50 years since it decided *Rogers*, and this Court should not permit the division and confusion in the lower courts to persist further. This conflict—ample reason for this Court to grant review under any circumstances, see Sup. Ct. R. 10(a)—is particularly significant where FELA is concerned. FELA is the exclusive remedial scheme for practically all railroad workplace injuries. See 45 U.S.C. § 51. Because of FELA, there is no worker's compensation scheme for railroad employees. *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521, 538-39 (1957) (Frankfurter, J., dissenting). Moreover, FELA broadly preempts state tort statutes that would otherwise apply to such injuries. *Mondou* v. *New York, New Haven & Hartford R.R.*, 223 U.S. 1, 55 (1912).

Accordingly, the causation standard at issue here implicates nearly every case involving an employee's injury while employed by a railroad.

A. Statutory Background

Section 1 of FELA makes "[e]very common carrier by railroad ... liable in damages" for the injury or death of any employee employed in interstate commerce that "result[s] in whole or in part from the [railroad's] negligence." 45 U.S.C. § 51. Absent an express statutory departure, the requisite elements of a FELA cause of action are determined by the common law "'as established and applied in the federal courts.'" *Urie* v. *Thompson*, 337 U.S. 163, 174 (1949).

In addition to FELA, Congress enacted two railroad safety statutes during the late nineteenth and early twentieth centuries that regulate aspects of railroad operation and maintenance: (1) the Boiler Inspection Act ("BIA"), 49 U.S.C. §§ 20701-20703, which mandates various safeguards for railroad locomotives and boilers; and (2) the SAA, *id.* §§ 20301-20306, which imposes similar requirements for designated safety devices, including—as relevant here—a train's brakes, *id.* § 20302(a)(4), (5).[1]

Violations of the BIA or SAA are actionable under FELA. *Urie*, 337 U.S. at 188-89. "The duty imposed is an absolute one and the carrier is not excused by any showing of care, however assiduous." *Brady* v. *Terminal R.R. Ass'n*, 303 U.S. 10, 15 (1938). A violation of either statute alone "suppl[ies] the wrongful act necessary to ground liability under the F.E.L.A.," leaving the plaintiff to prove only causation and damages. *Carter* v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430, 434-35 (1949). Furthermore, while the general rule under FELA is that, if the employee's contributory negligence is proven, "damages shall be diminished by the jury in

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[1] Those provisions were originally codified at 45 U.S.C. § 1 *et seq.*, but were recodified in Title 49 in 1994.

proportion to the amount of negligence attributable to such employee," that rule does not apply when the jury finds a violation of the safety statutes. 45 U.S.C. § 53; *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 437 (1958).

B. Factual Background

This case arises out of an injury sustained by Plaintiff-Respondent Honas Richards while walking along a railroad track and inspecting a train.

On April 30, 1999, Richards reported to work at the Buckeye yard in Columbus, Ohio at approximately 10:00 p.m. He performed his regular duties as a conductor and assisted in coupling the engine to the train and checking the brakes. Sixth Circuit Amended Joint Appendix ("JA") 81-84. Richards's train left the yard on its way to Cincinnati, Ohio around midnight. JA85.

Approximately 30 minutes after leaving Buckeye yard, the train went into "emergency" and came to a complete stop. *Id.* Richards was not injured by the emergency stop. Richards took at least 20 minutes to prepare to inspect the train for the cause of the sudden stop. Following that delay, he exited the train, and made his inspection. JA89. In so doing, Richards searched for derailed cars, load shifts, or any other reason why the train had stopped, including an air leak in the brake system. JA89-90.

It was during the course of this subsequent inspection that Richards injured his back. Richards described the incident as follows:

> I was walking east stopping occasionally to glance underneath the freight cars to see if they were still sitting on top of the rail and all at once, as I recall, I planted my right foot and was about to make a step with my left foot and all at once there was nothing underneath my right foot. And since I was on a severe slope from left to right, high on the left and low on the right, and the

> weight had been on my right foot and now there's nothing underneath my foot, I had the sensation I was going to fall on top of my head. Just roll over on top of my head. So I just rolled around to square my feet up on the bank.

JA91.

Richards was unable to explain what caused him to lose his balance. JA96. He testified that the area where he almost fell was not slippery, nor were there any weeds or trees. JA96-97. And, although there were pieces of wood or metal in the area, he stated that he was able to step around those items as he walked along the ballast. JA96.[2]

After Richards's injury, he continued to inspect the train, JA92-93, but was unable to locate anything unusual to explain why the train had stopped. JA94-95, 99. He returned to the engine without making any repairs, and the train proceeded on its route. JA99-101.

C. Proceedings Below

1. Richards brought suit against Conrail, in which he alleged violations of FELA, the BIA and the SAA. JA6-9. In his complaint, he alleged two negligent acts by Conrail: First, that Conrail was negligent for creating the ground condition that caused his feet to give way. JA8 ¶¶ 10-11. Second, Richards asserted, Conrail was liable under the SAA, on the theory that the train had a defective control valve—which caused the emergency stop—which caused him to inspect the train—which caused him to walk along the tracks—during the

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[2] Later, Richards attempted to retreat from this testimony. In an affidavit opposing Conrail's motion for summary judgment, he claimed that he fell as a result of "road ballast [that had] shifted or collapsed. JA197 ¶ 21. He further asserted that he would not have fallen if he had been walking on "yard ballast"—which is composed of smaller stones that are more tightly packed, and that the road ballast was used on the track because it costs less. JA196-97 ¶¶ 12-15, 21. The district court properly rejected this effort to manufacture an evidentiary dispute. App. 21a-22a.

course of which he sustained his injury. Thus, he asserted, the defective control valve caused his injuries. *Id.*

Conrail moved for summary judgment, which was granted. App. 27a. On Richards's first theory, the district court concluded that Richards had failed to present any evidence that Conrail had negligently created an unsafe ground condition; in his deposition, after all, he had specifically testified that he did not know what caused him to fall. The court properly recognized that Richards could not defeat summary judgment by filing an affidavit that contradicted his own prior deposition testimony. *Id.* at 21a-23a.

The court also granted summary judgment on Richards's SAA claim. It concluded that Richards had presented inadequate evidence of a safety defect—Richards had simply opined that a defective control valve "'must have'" caused the train to go into emergency. App. 24a-25a. Moreover, even if there were a defective valve, the court concluded Richards had "failed to show that his injury was causally linked to the allegedly defective control valve." *Id.* at 26a. The trial court relied upon *Reetz* v. *Chicago & Erie Railroad*, 46 F.2d 50 (6th Cir. 1931), which had applied the FELA causation standard this Court established in *Davis*: "'an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury.'" 46 F.2d at 51 (quoting *Davis*, 263 U.S. at 243). *Reetz* applied *Davis* to deny recovery where a defective safety appliance was the reason a train had stopped, thus creating the "incidental situation" in which the plaintiff was injured, but was not itself the "efficient cause" or "instrumentality" causing the injury. *Id.* at 52. On the authority of *Reetz*, the trial court found no causation as a matter of law:

> Plaintiff's slip while walking the track was only incidentally caused by the alleged appliance violation;

> the injury was not the 'direct or efficient' cause of any alleged appliance violation. As in *Reetz*, although Plaintiff would not have been walking the track to inspect but for the allegedly defective appliance, his subsequent slip and injury bears too tenuous a connection with the defective appliance so as to give rise to liability.

App. 27a.

2. Richards appealed only the judgment on his SAA claim to the Sixth Circuit. App. 2a n.1. Thus, there was no claim before the Sixth Circuit—and no argument remains in this case—that negligently maintained ground conditions caused his injury. The *only* surviving allegation was—and is—that the train's allegedly defective brakes caused his injury.

The Sixth Circuit reversed. First, on the issue of whether Conrail violated the SAA, it accepted as adequate for summary judgment purposes Richards's testimony that the emergency stop "'must have been'" caused by a defect in the train's air brakes. App. 6a.

Second, on the issue of causation, the Sixth Circuit overruled *Reetz*, stating that the causation standard it applied had "been called into question by the United States Supreme Court's holding in *Rogers*." App. 2a. It acknowledged that

> [p]rior to *Rogers*, several courts analyzed the issue of causation by distinguishing situations where the defective appliance was "the cause of or the instrumentality through which the injury [was] directly brought about" from instances where the defect merely was incidental in creating the condition in which the plaintiff was injured.

Id. at 8a-9a (second alteration in original). It further noted that even after *Rogers* the Sixth Circuit itself had applied this rule to deny recovery where the SAA violation was not a

contributory proximate cause of the injury. *Id.* at 9a-10a.[3] But, according to the Sixth Circuit, that causation standard was inconsistent with *Rogers*, which it interpreted as having established a "relaxed standard" of causation "requir[ing] a plaintiff alleging a FELA violation to offer 'more than a scintilla of evidence in order to create a jury question on the issue of employer liability, but not much more.'" *Id.* at 8a; see also *id.* at 14a (the test is whether "a reasonable jury could conclude that the defective appliance played *any* part, even the slightest, in bringing about the plaintiff's injury"). The Sixth Circuit thus held that "in light of *Rogers* ... *Reetz* no longer is good law." *Id.* at 14a. Applying the standard it derived from *Rogers*, the Sixth Circuit concluded that even the attenuated link between the alleged defect in the brakes (which was never discovered, and established only by Richards's testimony) and his slip and fall on the railroad tracks, was enough to establish liability. The court acknowledged as a theoretical matter that there must be some outer boundary to causation, *id.* at 14a n.5, but concluded nonetheless that the series of events in this case fell within that outer limit.

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[3] As the court of appeals noted, App. 9a-10a, the decision below is only the latest episode in a long-running conflict within the Sixth Circuit on this issue. On the one hand, after *Reetz*, the Sixth Circuit had previously held that *Davis* v. *Wolfe* and other pre-*Rogers* decisions remain good law, and that a FELA plaintiff must demonstrate proximate cause. *Green* v. *River Terminal Ry.*, 763 F.2d 805, 810 (6th Cir. 1985); *Black* v. *Penn Cent. Co.*, 507 F.2d 269, 271 (6th Cir. 1974) (citing *Coray* v. *Southern Pac. Co.*, 335 U.S. 520, 523 (1949)). Yet it has also held that "negligence of an employer [does] not have to be the sole cause *or 'the proximate cause'* of [an] injury in order to justify recovery." *Hausrath* v. *New York Cent. R.R.*, 401 F.2d 634, 637 (6th Cir. 1968) (emphasis added); see also *Tyree* v. *New York Cent. R.R.*, 382 F.2d 524, 529 (6th Cir. 1967) ("it would be better in Federal Employers' Liability Act cases if no mention of proximate cause whatever was made to the jury").

REASONS FOR GRANTING THE WRIT

In the decision below, the Sixth Circuit improperly held that the FELA proximate causation rule established by this Court in *Davis* v. *Wolfe*, 263 U.S. 239 (1923), and previously followed in that circuit, "no longer is good law" in light of *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957). App. 14a. Certiorari is justified because the Sixth Circuit has committed the cardinal error of discarding precedent of this Court as superseded, which this Court has declared to be its exclusive prerogative. *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

Just as fundamentally, nothing in *Rogers*—which simply vindicates the rule that a railroad can be held liable under FELA if its negligence is a contributory (and not just the sole) proximate cause of an employee's injury—purports to overrule the longstanding rule of *Davis* and numerous other decisions of this Court defining FELA causation. Indeed, *Rogers* specifically relies on precedents that restated the *Davis* rule. The petitioner in *Rogers* did not ask this Court to overrule prior precedent, and the strong policy of *stare decisis* in statutory interpretation forbids any inference that in *Rogers* this Court *sub silentio* overruled decades of causation precedents. The lower courts are divided over the effect of *Rogers* on rules of proximate causation, and this Court should act now to clarify this critical issue that affects jury instructions and liability in virtually every case arising under FELA.

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH BINDING SUPREME COURT PRECEDENT, WHICH IT DEEMED TO BE OVERRULED.

Under FELA, a railroad is liable in damages for an injury to an employee engaged in interstate commerce "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51. The

long established standard of causation under FELA, set forth in numerous cases of this Court, is proximate cause: the plaintiff must prove that "negligence was the proximate cause in whole or in part" of the employee's injury. *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29, 32 (1944).[4] Accordingly,

> "[T]o warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

Brady v. *Southern Ry.*, 320 U.S. 476, 483 (1943).

The same rule applies for SAA violations as for any other claim of negligence. Liability does not flow simply from a violation of the SAA, for "the test of causal relation stated in the Employers' Liability Act is applicable." *Carter*, 338 U.S. at 434. Thus, the right of recovery against the railroad is limited to an "injury the proximate cause of which was a failure to comply with the requirement of the Act." *Brady*, 303 U.S. at 15 (internal quotation marks omitted); *St. Louis & S.F. R.R.* v. *Conarty*, 238 U.S. 243, 249 (1915); *Lang* v. *New York Cent. R.R.*, 255 U.S. 455, 461 (1921); *Louisville &*

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[4] *See, e.g., Lang* v. *New York Cent. R.R.*, 255 U.S. 455, 461 (1921) (reversing for lack of evidence of proximate cause); *St. Louis-S.F. Ry.* v. *Mills*, 271 U.S. 344, 347 (1926) (same); *Northwestern Pac. R.R.* v. *Bobo*, 290 U.S. 499, 503 (1934) (same); *see also, e.g., St. Louis, Iron Mountain & S. Ry.* v. *McWhirter*, 229 U.S. 265, 280 (1913); *Davis* v. *Kennedy*, 266 U.S. 147, 148 (1924); *Minneapolis, St. Paul & Sault Ste. Marie Ry.* v. *Goneau*, 269 U.S. 406, 409-10 (1926); *New York Cent. R.R.* v. *Ambrose*, 280 U.S. 486, 489 (1930); *Swinson* v. *Chicago, St. Paul, Minneapolis & Omaha Ry.*, 294 U.S. 529, 531 (1935); *Brady*, 303 U.S. at 15; *Tiller* v. *Atlantic Coast Line R.R.*, 318 U.S. 54, 67 (1943); *Coray* v. *Southern Pac. Co.*, 335 U.S. 520, 523 (1949); *Urie*, 337 U.S. at 195; *O'Donnell* v. *Elgin, Joliet & E. Ry.*, 338 U.S. 384, 390 (1949); *Carter*, 338 U.S. at 435; *Brown* v. *Western Ry.*, 338 U.S. 294, 297-98 (1949).

Nashville R.R. v. *Layton*, 243 U. S. 617, 621 (1917) ("carriers are liable to employees in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them when engaged in the discharge of duty").

In *Davis*, this Court undertook to reconcile its various SAA precedents applying the rule of proximate cause, and stated the following standard:

> The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, *but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury*; and, on the other hand, he can recover if the failure to comply with the requirements of the Act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection.

263 U.S. at 243 (emphasis added).

In *Reetz* v. *Chicago & Erie Railroad*, 46 F.2d 50 (6th Cir. 1931), the Sixth Circuit was confronted with a claim that after a train had stopped because of a failed safety appliance, the railroad should be absolutely liable under the SAA for a subsequent injury to a crew member who had fallen on the tracks while inspecting the train. The court of appeals stated that after *Davis*, the law of causation for such alleged SAA violations "is, we think, clear." *Id.* at 51. The *Reetz* court went on to quote the holding of *Davis* above, and to examine cases applying the *Davis* rule in noncollision cases. *Id.* at 51-52. Following *Davis*, the *Reetz* court held that

> where there has been a failure of a required appliance, there is liability only where the failure of the appliance

> not only creates a condition under which, or an incidental situation in which the employee is injured, but where the defective appliance is itself an efficient cause of or the instrumentality through which the injury is directly brought about.

Id. at 52. The *Reetz* court held that the SAA violation resulting in stoppage of the train created an "incidental situation" in which the plaintiff was injured in walking along the tracks, "but the defective appliance bore no other relation to the injury." *Id.*

Notwithstanding that *Reetz* simply applied the rule established by this Court in *Davis*, the Sixth Circuit below has now improperly held that the rule of *Reetz*, and logically the rule in *Davis*, are "no longer ... good law" in light of *Rogers*. App. 14a. The court below pointed to the holding of *Rogers* that under FELA "'the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" *Id.* at 7a (quoting *Rogers*, 352 U.S. at 506-07). The Sixth Circuit held that the distinction between injuries from an "incidental situation" created by an SAA violation, and injuries caused by the defective appliance itself, did not survive *Rogers*, *id.* at 14a—even though this distinction was drawn in *Davis* itself, 263 U.S. at 243, and *Rogers* never hinted at overruling *Davis*.

Certiorari should be granted simply because the Sixth Circuit did not have authority to depart from the *Davis* rule in deciding this case, regardless of the effect of *Rogers*. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas*, 490 U.S. at 484; *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997) ("it is this Court's prerogative alone to overrule one of its precedents").

Equally important, this Court's review is necessary because the Sixth Circuit's decision is based on a wholesale misreading of *Rogers*. *Rogers* did not overrule *Davis* or any of the numerous precedents of this Court establishing the rule of proximate cause under FELA. Rather, *Rogers* rejected a particular common-law conception of "proximate cause" that requires a showing that the railroad's wrongful act was the "sole, efficient, producing cause of injury." 352 U.S. at 506. That precise formulation was contrary to both the plain language of FELA and this Court's precedents. *Rogers* simply made clear that in circumstances where the jury could find either the employee's or the railroad's negligence to be the legal cause of the injury, the claim against the railroad had to go to a jury even if the railroad's contribution to the injury was slight. *Id.*

Even before *Rogers*, this Court had not hesitated to overrule courts that used language of "proximate cause" in this fashion to deny plaintiffs a jury determination of their FELA claim against the railroad. Thus, in *Coray* v. *Southern Pac. Co.*, 335 U.S. 520 (1949), the lower court had held that a railroad's SAA violation (which caused a freight train to come to a sudden stop because of a brake malfunction) was not the proximate cause of the employee's death; it had reasoned that, because the employee could have avoided the accident if he had not been negligent in failing to brake the motor car that was following the train on the same tracks, the railroad's violation of the SAA was only a "'cause' in the 'philosophical sense'" of the fatal accident. In reversing, this Court held that "the introduction of dialectical subtleties can serve no useful interpretative purpose," given FELA's plain declaration "that railroads shall be responsible for their employees' deaths 'resulting in whole or in part' from defective appliances such as were here maintained." *Id.* at 523-24. But, in overruling the lower court's *application* of the proximate-cause doctrine to the facts of that case, this Court in *Coray* explicitly stated that the proximate cause standard of *Davis* remained the rule

under FELA; it held that "petitioner was entitled to recover if this defective equipment was the sole *or a contributory proximate cause* of the decedent employee's death. *Davis v. Wolfe*, 263 U.S. 239, 243; *Spokane & I.E.R. Co. v. Campbell*, 241 U.S. 497, 509-10." *Coray*, 320 U.S. at 523 (emphasis added).

Rogers, like *Coray*, was a case in which the state court had improperly taken the case away from the jury even though there was evidence that the railroad's negligence was one of two possible legal causes of his injury. In *Rogers*, the employee had been burning weeds on a sloping track bed. When a train passed, it fanned the flames of the fire he had created, and forced the employee back onto a culvert where he slipped on gravel and fell off the culvert, injuring himself. The employee adduced evidence that the railroad was negligent in requiring him to work near the tracks where passing trains could fan the flames around him, and in failing to maintain the surface of the culvert; the railroad countered with evidence that the plaintiff was negligent in not watching his fire. 352 U.S. at 502-04. This Court expressly stated that, on the evidence presented, the jury could have found either the employee or the railroad to have been the legal cause of the injury. *Id.* at 504.

But even though the jury found for the plaintiff, the Missouri Supreme Court reversed, in part on the ground that the employee's "conduct was at least as probable a cause for his mishap as any negligence of the [railroad], and that in such case there was no case for the jury." *Id.* at 505. The state court had erroneously ruled that "there is no jury question in actions under this statute ... unless the judge can say that the jury may exclude the idea that his injury was due to causes with which the defendant was not connected." *Id.* at 505-06. According to this Court, the lower court improperly invoked "language of proximate causation which makes a jury question dependent upon whether the jury may find that *the defendant's negligence was the sole, efficient, producing*

cause of injury." *Id.* at 506 (emphasis added). A rule that the railroad's negligence must be "the sole, efficient, producing cause of injury" is contrary to the statutory directive that renders railroads liable if they are a partial cause of the employee's injury. 45 U.S.C. § 51. Accordingly, this Court held that, "[u]nder this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U.S. at 506 & n.11 (citing *Coray*, 335 U.S. 520 (1949)). If that test is met, "a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities." *Id.* at 507.

There is no colorable reading of *Rogers* as overruling the *Davis* causation standard. Rather, *Rogers* held that when there is evidence sufficient to support a verdict against the railroad (*i.e.*, to support a finding that the railroad's negligence was a legal cause of the injury), but also evidence to support a finding that the plaintiff's negligence was the cause of the injury, *id.* at 504, the plaintiff's claim against the railroad must go to the jury if there was any evidence that the railroad's negligence "played any part, even the slightest," relative to the employee's negligence in causing the employee's injury, *id.* at 506. The existence of a jury question was not "dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury." *Id.* *Rogers* was not creating new law; it simply restated settled law under FELA for cases involving multiple causation. See, *e.g.*, *Hines* v. *Sweeney*, 201 P. 165, 170 (Wyo. 1921) ("Under this act the railroad company is liable, if its negligence contributes proximately to the injury, no matter how slightly, and no matter how great may be the negligence of the employee."); *New York Chi. & St. Louis R.R.* v. *Niebel*, 214 F. 952, 955 (6th Cir. 1914) (a railroad "is liable, if through other employés it is guilty of any causative negligence no matter how slight in comparison to

that of plaintiff"); *Atlantic Coast Line R.R.* v. *McIntosh*, 198 So. 92, 96 (Fla. 1940) (Brown, J., dissenting in part and expressing the opinion of the court with regard to this issue). More particularly, nothing in *Rogers* questions the longstanding FELA rule for determining the threshold question of when a railroad's negligence is a legal cause of the injury: namely, whether the injury is "'the natural and probable consequence of the negligence or wrongful act,'" *Brady*, 320 U.S. at 483. The railroad's wrongful act must be "a proximate cause of the accident which results in his injury," and not "merely create[] an incidental condition or situation in which the accident, otherwise caused, results in such injury." *Davis*, 263 U.S. at 243.

Rogers itself confirms this understanding. It explicitly derives its "test of a jury case" from *Coray*, see *Rogers*, 352 U.S. at 506 & n.11, and *Coray* (as noted above) reaffirms, citing *Davis*, that the railroad's negligence must be either "the sole or a contributory proximate cause" of the employee's injury." *Coray*, 320 U.S. at 523. Moreover, the *Rogers* Court observed in a footnote that in cases involving violations of the SAA, the jury could not consider the plaintiff's contributory negligence, and "[t]he only issue then remaining is causation," citing *Carter* v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430 (1949). *Rogers*, 352 U.S. at 507 & n.13. *Carter* (quoting *Coray*, 335 U.S. at 523) likewise holds that the railroad can only be held liable if "the jury determines that the defendant's breach is 'a contributory proximate cause' of injury." *Carter*, 338 U.S. at 435. Indeed, this Court has recognized that *Davis* remains good law in a case decided after *Rogers*. *Kernan*, 355 U.S. at 434.

It is significant that none of the dissenting justices in *Rogers* read that case as a sweeping abrogation of prior precedent regarding FELA's causation standard. Justice Frankfurter would have simply dismissed the writ as improvidently granted because he regarded Rogers as yet another "insignificant" FELA case about the sufficiency of

the evidence, of which the Court had taken many in that period. *Ferguson*, 352 U.S. at 546 (Frankfurter, J., dissenting).[5] He noted that, although the Act abolished certain defenses, it was the "historic cause of action for negligence as it developed from the common law," *id.* at 538, with the proviso that "on the question of causality, the statute had tried to avoid issues about 'sole proximate cause,' meeting the requirement of a causal relation with the language that the injury must result 'in whole or in part' from the employer's negligence," *id.* at 538 n.7. It is thus clear that Justice Frankfurter gave *Rogers* the interpretation set forth above, and did not understand the majority to have abolished proximate cause in contravention of existing precedent. Justice Harlan agreed with Justice Frankfurter that the case never should have been granted, but felt compelled to reach the merits. *Id.* at 559-62 (Harlan, J., dissenting). But he dissented simply because he viewed the Court as substituting its judgment for the lower court's, and alternatively as applying a sufficiency-of-the-evidence standard inconsistent with typical common-law review of jury verdicts. *Id.* at 562-64.

Nor did the petitioner in *Rogers* ever ask the Court to overrule *Davis* or any other precedent of this Court establishing proximate cause as the FELA standard. His position was simply that the railroad's "negligence was the proximate cause of petitioner's injury," and that by allowing recovery for injuries caused "in part" by the railroad's negligence, FELA had "broadened" the causation standard from "the old concept of proximate cause," wherein "th[e] cause must have been direct, the complete, the responsible, the efficient cause of the injury." Brief for Pet'r, at 4, 24-25, *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500 (1957) (No. 28)

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[5] Justice Frankfurter's dissent in *Ferguson* also applied to *Rogers* and two other cases. 352 U.S. at 524 n.*. Similarly, Justice Harlan filed a single opinion that dissented from *Ferguson*, *Rogers* and one other case, and concurred in the fourth case. *Id.* at 559 n.*.

(capitalization omitted). The railroad should be held liable, he argued, even if "some other factor may logically be said to be more influential in producing the injury." *Id.* at 27.

Substituting "slightest" cause as the standard for legal cause under FELA in place of the *Davis* proximate cause rule would cause a dramatic and unwarranted expansion of railroad liability. Tort law has always differentiated legal cause from cause-in-fact, see *Restatement (Second) of Torts* § 435 (1965), but a "slightest cause" standard is not materially different from a but-for causation standard. Absent a requirement that the railroad's negligence be a proximate cause of the employee's injury, FELA becomes less a tort statute than a worker's compensation statute for any wrongful act, without the limitations on recovery that most statutes apply. See *Carter*, 338 U.S. at 437-38 (Frankfurter, J.). The ramifications of reducing legal cause to the "'featherweight'" slightest-cause standard, *Johnson* v. *Offshore Express Inc.*, 845 F.2d 1347, 1352 (5th Cir. 1988), are particularly grave in the situation presented here of violations of the SAA (or the BIA). Under those statutes, the railroad's duties are absolute and the contributory negligence of the employee cannot be considered to reduce damages. See 45 U.S.C. § 53; *Rogers*, 352 U.S. at 507 n.13. Congress intended absolute liability for injuries that are the "'natural and probable consequence[s]'" of the statutory violation, *Brady*, 320 U.S. at 483, but not for all injuries with only the slightest causal connection to a violation, including ones in which the violation "merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury," *Davis*, 263 U.S. at 243.

This case illustrates the senselessness of the Sixth Circuit rule. It is commonplace for railroad workers to walk on the tracks alongside trains for all manner of reasons during train operations. If the worker falls and hurts himself, the railroad would generally be liable only if it negligently maintained the right of way, and, if so, its damages would be reduced by any

contributory negligence of the employee. It would be absurd to think Congress would impose absolute liability, without regard to contributory negligence, simply because the reason the employee got off the train to walk along the tracks was to inspect a malfunctioning brake.

Thus, under *Davis*, a FELA claim cannot go to the jury if the railroad's wrongful act "is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury." *Id.* *Rogers* simply adds that, if the evidence would permit a jury to choose among multiple possible legal causes of the injury (such as the employee's and the railroad's negligence), the claim against the railroad must be allowed to go to the jury even if the railroad's negligence played the "slightest" part in the injury; such negligence need not be shown to be "the sole, efficient, producing cause of injury." 352 U.S. at 506. The Sixth Circuit not only lacked authority to say that *Rogers* superseded the rule of *Davis*, but it was wrong on that score. This Court should grant review to preserve its exclusive prerogative of determining the validity of its precedents, and should restore the rule of *Davis* in the Sixth Circuit.

II. THE DECISION BELOW WIDENS VARIOUS CONFLICTS OVER THE MEANING OF *ROGERS* AND THE CAUSATION RULE APPLICABLE UNDER FELA.

Review is further warranted because the decision below widens a conflict among the lower courts—both federal circuit courts and state supreme courts—over the standard of causation applicable under FELA.

As a threshold matter, various courts have held that *Rogers* did not speak to the continuing validity of proximate causation under FELA, but instead dealt with multiple causation and the test of a jury case. Consistent with the discussion in Section I of this Petition, those courts have

properly read *Rogers* as simply eliminating old and outmoded common-law conceptions of proximate cause that required the railroad's negligence to be the complete or dominant cause of injury. *Strobel* v. *Chicago, Rock Island & Pac. R.R.*, 96 N.W.2d 195, 199-200 (Minn. 1959) (holding that *Rogers* rejects "[t]he definition of proximate cause as the 'dominant' or 'predominant' cause"); *Marazzato* v. *Burlington N. R.R.*, 817 P.2d 672, 674 (Mont. 1991) ("the *Rogers* case was addressing the issues of multiple causes and contributory negligence after it had been established that the employer was negligent"). Those authorities are in conflict with the decision below, which interpreted *Rogers* as modifying the standard of causation under FELA.

Furthermore, there is a deep conflict among numerous courts over FELA's standard of causation. On the one hand, various courts have held or directly stated that a plaintiff attempting to prove liability under FELA must demonstrate that his employer's conduct was a proximate cause of his injury. These courts constitute a second conflict with the decision below (and with other decisions like it, see *infra* at 22-23).

In *Reed* v. *Pennsylvania Railroad*, the Ohio Supreme Court squarely held that a plaintiff must show proximate cause to prevail under FELA. 171 N.E.2d 718, 721-22 & n.3 (Ohio 1961). As in this case, the plaintiff was injured after the train stopped because of brake problems. Plaintiff sued,[6] and a directed verdict was entered against him, which was ultimately affirmed by the Ohio Supreme Court.

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[6] Reed's theory of liability was remarkably similar to Richards's claim in this case:

> * * * had the brakes not been defective, plaintiff would not have been required to descend from the cab and consequently injured; had the radiotelephone functioned properly, similar reasoning shows that likewise, plaintiff would have been saved from injury.

171 N.E.2d at 721.

The Ohio Supreme Court rejected plaintiff's claim because he was unable to demonstrate proximate cause. *Id.* at 721. Citing both *Carter* v. *Atlanta & St. Andrews Bay Ry.* and *Davis* v. *Wolfe*, the Court held that liability under the SAA requires a showing of proximate cause: "In order to support recovery for an injury claimed to have been caused by a violation of the Federal Safety Appliance Act, such violation must amount to *a* proximate cause of such injury although it need not be *the* proximate cause thereof." *Id.* at 721 n.3; see *id.* at 721 ("such violation could not legally amount to a proximate cause of the injury"). That court obviously did not view *Rogers* as having undermined this standard, for it elsewhere cited *Rogers*, but did not do so in this context. *Id.* at 720 n.1.

This decision stands in direct conflict with the decision below. The resulting conflict between the state and federal courts with jurisdiction over Ohio creates a particularly compelling argument for review by this Court.

In *Chapman* v. *Union Pacific Railroad*, 467 N.W.2d 388, 395 (Neb. 1991), the Nebraska Supreme Court likewise held that FELA requires a showing of proximate cause: "To recover under the Federal Employers' Liability Act, an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's injury." See also *id.* ("'To prevail in an action based on negligence, a plaintiff must prove ... proximate causation ...."); *id.* at 396 ("a Federal Employer's Liability Act plaintiff must prove proximate cause" (citing *Chesapeake & Ohio Ry.* v. *Carnahan*, 241 U.S. 241 (1916)).

And in *Marazzato*, the Montana Supreme Court expressly rejected the argument that *Rogers* lowered a plaintiff's burden of proof. 817 P.2d at 674-75. Rather, it concluded, *Rogers*' purpose was to establish standards that govern multiple causation and contributory negligence. *Id.* at 674. In so reasoning, the court squarely held that proximate cause remains the rule under FELA: "The plaintiff has the burden

of proving that defendant's negligence was the proximate cause in whole or in part of plaintiff's" injury. *Id.* at 675. Other federal circuit courts and state supreme courts have likewise recognized the rule of proximate cause even after *Rogers*. See *Reed* v. *Philadelphia, Bethlehem & New England R.R.*, 939 F.2d 128, 130 (3d Cir. 1991) (a violation of the SAA is "'in itself an actionable wrong, in no way dependent upon negligence *and for the proximate results of which there is liability*'" (emphasis added) (quoting *O'Donnell* v. *Elgin, Joliet & E. Ry.*, 338 U.S. 384, 390 (1949))); *Gardner* v. *CSX Transp., Inc.*, 498 S.E.2d 473, 483 (W. Va. 1997) ("'to entitle plaintiff to recover the proof must justify with reason that the injury complained of resulted, in whole or in part, from negligence of defendant which contributed proximately to the cause of the injury'"); *Lyles* v. *Alabama State Docks Terminal Ry.*, 730 So. 2d 123, 125 (Ala. 1998) (citing *Davis* as setting forth the causation standard under FELA); *Orchelle* v. *CSX Transp., Inc.*, 574 So. 2d 749, 752 (Ala. 1990) ("a railroad employee should be allowed to recover 'if the failure to comply with the requirements of the [SAA] is a proximate cause of the accident'" (alteration in original) (quoting *Davis*, 263 U.S. at 243));[7] *Snipes* v. *Chicago, Cent. & Pac. R.R.*, 484 N.W.2d 162, 164 (Iowa 1992) ("[r]ecovery under the FELA requires an injured employee to prove ... that the [employer's] negligence *proximately caused*, in whole or in part, the accident" (emphasis added)).[8]

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[7] The Alabama Supreme Court, in an earlier FELA case not involving the SAA, had interpreted the *Rogers* "slightest part" standard as "'either departing from, or eliminating in toto, the common-law concept of proximate cause.'" *Seaboard Coast Line R.R.* v. *Moore*, 479 So. 2d 1131, 1137 (Ala. 1985) (per curiam). It is not clear whether Alabama suffers from internal conflict, or purports to apply a different causation standard to SAA than to negligence claims.

[8] These are only the cases post-*Rogers* that continue to recognize a proximate cause standard. In other States, there exist pre-*Rogers* cases that remain good law in their jurisdictions, and that likewise require a

In marked contrast to these cases, the Sixth Circuit has now joined arms with other courts that permit FELA liability to arise on a showing of extraordinarily tangential "'featherweight'" causation. *Johnson*, 845 F.2d at 1352; *accord Page* v. *St. Louis S.W. Ry.*, 312 F.2d 84, 89 (5th Cir. 1963) (*Rogers* constituted a "departure from traditional common-law tests of proximate causation"; accordingly, a jury instruction regarding proximate cause was error); *Armstrong* v. *Kansas City S. Ry.*, 752 F.2d 1110, 1114 (5th Cir. 1985) (contrasting the *Rogers* standard with proximate cause). In addition to the Fifth and Sixth Circuits, courts that interpret *Rogers* to have overturned *sub silentio* this Court's precedents concerning proximate causation include the Second, Eighth, Ninth and Tenth Circuits. See *Nicholson* v. *Erie R.R.*, 253 F.2d 939, 940 (2d Cir. 1958) ("to impose liability on the defendant, the negligence need *not* be the proximate cause of the injury" (emphasis added)); *Ulfik* v. *Metro-N. Commuter R.R.*, 77 F.3d 54, 58 (2d Cir. 1996); *Fletcher* v. *Union Pac. R.R.*, 621 F.2d 902, 909 (8th Cir. 1980) ("The test of causation under the FELA is whether the railroad's negligence played any part, however small, in the injury ...."); *Claar* v. *Burlington N. R.R.*, 29 F.3d 499, 503-04 (9th Cir. 1994) (FELA requires proof of only a "small quantum of causation"); *Oglesby* v. *Southern Pac. Transp. Co.*, 6 F.3d 603, 607 (9th Cir. 1993) ("'proximate cause' is not required under the FELA"); *Summers* v. *Missouri Pac. R.R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997) (holding that *Rogers* "definitively abandoned" proximate causation); *McCalley* v. *Seaboard Coast Line R.R.*, 265 So. 2d 11, 15 (Fla. 1972) ("the concept of proximate cause no longer has

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showing of proximate cause. *E.g.*, *Crozier* v. *Charleston & W.C. Ry.*, 71 S.E.2d 800, 802, 804, 806 (S.C. 1952); *Johnson* v. *Chicago Great W. Ry.*, 64 N.W.2d 372, 375-77 & nn.1, 5-6 (Minn. 1954); *Strobel*, 96 N.W.2d at 200.

any place in an action under the Federal Safety Appliance Act").[9]

In short, there is a square, deep conflict among the federal circuit courts and state supreme courts concerning the standard of causation under FELA.

The conflicts set forth above are ample reason for this Court to grant review. Yet even these divisions do not fully capture the state of the law in the lower courts. More than just a binary conflict between jurisdictions that require a showing of proximate cause and those that do not, the lower courts are in a state of chaos. There are conflicts within decisions of the same court. Compare, *e.g.*, *Houston Lighting & Power Co.* v. *Atchison, Topeka & Santa Fe Ry.*, 890 S.W.2d 455, 457 (Tex. 1994) (proximate cause), with *Maritime Overseas Corp.* v. *Ellis*, 971 S.W.2d 402, 406 (Tex. 1998) (Jones Act case holding that *Rogers* rejects proximate causation and establishes a "'featherweight'" slight-cause standard, but not addressing *Houston Lighting*); see also *supra* notes 3 and 7. Perhaps more importantly, there are a number of conflicts between the highest state court and the federal circuit court with jurisdiction over that State. In addition to the conflict within Ohio noted above, see *supra* at

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[9] Many of these courts, which take a broad reading of *Rogers* without close analysis of that case, rely on statements in *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532 (1994) that FELA employs a "relaxed standard" of causation, *id.* at 543, and in *Crane* v. *Cedar Rapids & Iowa City Railway*, 395 U.S. 164 (1969), that a FELA plaintiff "is not required to prove common-law proximate causation," *id.* at 166. Those statements are true insofar as they mean that *Rogers* rejected the older common law conception of "proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury." *Rogers*, 352 U.S. at 506. Indeed, *Davis* itself was regarded as a "liberal" interpretation of the "resulting in whole or in part" language of FELA. *Brady*, 303 U.S. at 15. In any event, such dicta cannot support the overruling of the many cases of this Court holding that proximate cause is the longstanding rule under FELA. This Court should act to clear up any confusion.

21, there are federal-state conflicts in Iowa, compare *Snipes*, 484 N.W.2d at 164, with *Fletcher*, 621 F.2d at 909; Montana, compare *Marazzato*, 817 P.2d at 675, with *Claar*, 29 F.3d at 503-04; and Nebraska, compare *Chapman*, 467 N.W.2d at 395, with *Fletcher*, 621 F.2d at 909. Furthermore, still other courts interpret *Rogers*—as did Justice Harlan at the time, see *Ferguson*, 352 U.S. at 563-64 (Harlan, J., dissenting)—as speaking to the evidentiary burden on FELA plaintiffs, rather than the substantive standard of causation under FELA. *E.g.*, *Seeberger* v. *Burlington N. R.R.*, 982 P.2d 1149, 1152 (Wash. 1999).

All of this disarray stems from a patent misinterpretation of *Rogers*. This Court should act now to bring clarity and closure to this issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 14, 2003

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 01-4130

HONAS H. RICHARDS,
Plaintiff Appellant,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant-Appellee.

Filed: May 28, 2003

Before MARTIN, Chief Circuit Judge; ROGERS, Circuit Judge; EDMUNDS, District Judge.*

OPINION

EDMUNDS, District Judge.

This appeal arises from the district court's grant of summary judgment for defendant-appellee Consolidated Rail Corporation ("Conrail") in this action filed under the Federal Safety Appliances Act ("FSAA"), 49 U.S.C. §§ 20301-20306, the Federal Employee Liability Act ("FELA"), 45 U.S.C. §§ 51-60, and the Federal Boiler Inspection Act ('BIA'), 49 U.S.C. §§ 20701-20703. Plaintiff Appellant Honas Richards ("Richards") challenges the district court's

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* The Honorable Nancy G. Edmunds, United States District Judge for the Eastern District of Michigan, sitting by designation.

dismissal of his FSAA claim,[1] arguing that the court erred in finding that he failed to produce sufficient evidence of a defective appliance and that this defect caused his injuries. Because we find that Richards produced sufficient evidence to survive summary judgment on the issue of the defect and because we find that this court's holding as to causation in *Reetz v. Chicago & Erie Railroad Co.*, 46 F.2d 50 (6th Cir.1931) has been called into question by the United States Supreme Court's holding in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957), and never clarified, we reverse and remand.

Richards began working for Conrail in 1953. He became a conductor in 1957 and was working in that position on May 1, 1999. On that date, Richards and a co-worker were responsible for taking a freight train with approximately ninety cars from Columbus, Ohio, to Cincinnati, Ohio.

Approximately thirty minutes after leaving Columbus, the train unexpectedly stopped as a result of an automatic emergency application of the air braking system. In such a situation, the conductor must attempt to determine the cause of the undesired brake application. This is done by "walking the train"—i.e. getting off the train, walking its length, and inspecting for visible causes. After placing an emergency radio call to the dispatcher, Richards climbed down from the train and began his inspection.

Richards walked east alongside the train on the ballast, stopping occasionally to inspect underneath the cars. At some point, he lost his footing and allegedly injured his back. Richards waited until the pain in his back subsided and then he completed his inspection.

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[1] The district court summarily dismissed Richards' FELA and BIA claims as well; however, he does not appeal those portions of the court's decision.

Richards did not observe any defects during his inspection that would have caused an emergency brake application—for example, an air hose leak, car derailment, or "shift in loads." Based on his experience and training, Richards therefore concluded that the stop must have been caused by a defective control valve, commonly referred to as a "kicker." Each freight car equipped with a brake has an internal valve that controls the amount of air that is depleted to activate the brake system. Obviously if this valve is located inside the brake mechanism, Richards could not visibly inspect it when he walked the train. As Richards explained,

> My examination eliminated everything except a defective control valve. There had to be a reason, and there was no reason—normal reasons are like busted air hoses where the air escapes into the atmosphere. Train brakes apply when air is taken away from the system not when it's put in. When you put it in, the brakes release. When you take it away, the brakes apply.
>
> And so there had to be some—since there was [sic] no leaks and I walked that whole thing . . . So based on my experience and what I've been taught in these classes, the only reasonable explanation was a defective control valve, a kicker.

The district court granted Conrail's motion for summary judgment, finding as to Richard's FSAA claim that he failed to provide sufficient evidence to prove that the braking system was defective. After reviewing the evidence, specifically the transcript from Richard's deposition, the court concluded that Richards only could "opine[ ]" that the stop was caused by a defective control valve. The court also concluded that, even upon proof of a defective appliance, Richards could not demonstrate that his injury was causally linked to the allegedly defective appliance. Relying primarily upon this court's opinion in *Reetz*, the district court held that

the defective control valve did not cause Richard's injury; rather, his injury merely was an incidental condition of the defect. The trial court explained,

> Plaintiffs slip while walking the track was only incidentally caused by the alleged appliance violation; the injury was not the 'direct or efficient' cause of any alleged appliance violation. As in *Reetz*, although Plaintiff would not have been walking the track to inspect but for the allegedly defective appliance, his subsequent slip and injury bears too tenuous a connection with the defective appliance so as to give rise to liability.

I. Standard of Review

We review *de novo* a district court's order granting summary judgment, viewing all the evidence and inferences therefrom in a light most favorable to the nonmoving party. *Campbell v. Grand Trunk W. R.R. Co.*, 238 F.3d 772, 775 (6th Cir.2001) (citations omitted). The moving party must show the absence of a genuine issue of material fact, and the nonmoving party must then come forward with specific facts showing that there is a genuine issue for trial. *Id.*

II. Analysis

The FSAA imposes an absolute duty on railroads to provide and maintain certain safety appliances, including power braking systems. *Myers v. Reading Co.*, 331 U.S. 477, 485, 67 S.Ct. 1334, 91 L.Ed. 1615 (1947); *O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U.S. 384, 390, 70 S.Ct. 200, 94 L.Ed. 187 (1949). To recover for a violation of the FSAA, therefore, plaintiffs need only show (1) the statute was violated; and (2) they suffered injuries "resulting in whole or in part" from the defective equipment. *Coray v. S. Pac. Co.*, 335 U.S. 520, 524, 69 S.Ct. 275, 93 L.Ed. 208 (1949).

A. Proof of a Defective Appliance

There are two recognized methods of showing that an appliance was defective: "'Evidence may be adduced to establish some particular defect, or the same inefficiency may be established by showing a failure to function, when operated with due care, in the normal, natural, and usual manner.'" *Myers*, 331 U.S. at 483, 67 S.Ct. 1334 (quoting *Didinger* V. *Pennsylvania R.R. Co.*, 39 F.2d 798 (6th Cir.1930)). As the *Myers* Court elaborated, "Efficient means adequate in performance; producing properly a desired effect. Inefficient means not producing or not capable of producing the desired effect; incapable; incompetent; inadequate." *Id.* If the plaintiff demonstrates a defect using the second method, he or she need not show an actual break or visible defect. *Id.* If the plaintiff establishes that the appliance functioned inefficiently at the relevant time, it is irrelevant that the appliance worked efficiently both before and after the occasion. *Id.*

Thus in *Didinger*, where the plaintiff demonstrated that he firmly set a hand brake which immediately gave way and failed to hold, this court held that it was not necessary for the plaintiff to show the specific reason why the brake failed:

> Assuming the proper setting of the [hand] brake, the fact that it did not hold demonstrates its inefficiency. As said *in* [*Philadelphia & R.R. Ry. Co. v. Auchenbach*, 16 F.2d 550, 552 (3d Cir.1926)]: 'The test of the observance of this duty (under the Safety Appliance Act) is the performance of the appliances,' and it was not necessary for the plaintiff to show whether this failure to function was due to the fact that the ratchet broke loose from the brake staff, that the ratchet teeth were worn, that the dog or its rocker pivot broke, that there was too much vertical play between dog and ratchet . . . or any other precise defect [*Minneapolis & St. Louis R.R. Co. v. Gotschall*, 244 U.S. 66, 37 S.Ct. 598, 61 L.Ed. 995

> (1917)]. If the brake was properly set, as asserted, some defect must have been latent in it. Otherwise it would have held.

Didinger, 39 F.2d at 799. As *Didinger* suggests, plaintiffs may rely on the doctrine of *res ipsa loquitur* to prove their FSAA claims. *Id.; see also Myers*, 331 U.S. at 483-84, 67 S.Ct. 1334 (holding that conductor's testimony that brake wheel did not function like ordinary wheel and that it suddenly "kicked back" and knocked him to ground was sufficient to make an issue for the jury as to whether brake was defective); *Anderson v. Baltimore & O.R. Co.*, 89 F.2d 629, 630 (2d Cir.1937)(finding that "the failure of the [sanding] apparatus to function when operated in a proper manner and under normal working conditions makes a prima facie case of insufficiency either in the air pressure or in mechanical construction. The doctrine of res ipsa loquitur has frequently been applied to prove, in the absence of explanation, a violation of provisions of the Safety Appliance Act.") Trial judges should not rule out plaintiffs' opinions as to why appliances functioned inefficiently, where the plaintiffs' opinions are based on their experience and perceptions at the time of their accident. *See Fritts v. Toledo Terminal R.R. Co.*, 293 F.2d 361, 363-64 (6th Cir.1961)(holding that trial judge improperly ruled out plaintiff's opinion, based on his experience working for the railroad, that lurching of the engine was due to a worn frog); *see also Myers*, 331 U.S. at 483, 67 S.Ct.1334 (holding that the plaintiffs testimony as to the inefficiency of the appliance "is such substantial evidence of inefficiency as to make an issue for the jury").

Here, the district court held that Richards failed to present evidence of a particular defect with the train's air braking system. Richards testified, however, that based on his experience and training and his visual inspection of the train following the emergency stop, that the stop "must have been" caused by a defective control valve. Although Richards may

not have emphatically expressed his assessment of the cause of the stop at his deposition, a jury could conclude that he was stating more than a mere assumption, as the district court characterized his testimony.

B. Causation

Turning to the second and final element of a plaintiff's FSAA claim—that is, whether the alleged defect caused the plaintiffs injury—the Supreme Court announced a relaxed test for establishing causation in FELA cases in its landmark decision, *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).[2] The *Rogers* Court set forth the following test to determine whether there is a jury question on this issue:

> Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met,

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[2] Although *Rogers* was a FELA case, its holding on causation applies to FSAA and BIA claims as well. *See Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949)(holding that the FSAA and BIA are substantially, if not in form, amendments to FELA; they dispense, for purposes of employees' suits, with necessity of proving that violations of the safety statutes constitute negligence; statutes should be read and applied together).

> are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in part' to its negligence.

Rogers, 352 U.S. at 506-07, 77 S.Ct. 443. Under this standard, the role of the jury is significantly greater in FELA cases than in common law negligence actions. *Eggert v. Norfolk & W. Ry. Co.*, 538 F.2d 509, 511 (2d Cir.1976) (citations omitted). As this court has explained, *Rogers* requires a plaintiff alleging a FELA violation to offer "more than a scintilla of evidence in order to create a jury question on the issue of employer liability, but not much more." *Aparicio v. Norfolk & W. Ry. Co.*, 84 F.3d 803, 810 (6th Cir.1996).

The *Rogers* Court adopted this relaxed standard in order to effectuate Congress' intent when it amended FELA in 1939 "to preserve the plaintiff's right to a jury trial." *Green v. River Terminal Ry. Co., 763* F.2d 805, 806 (6th Cir.1985). As the Supreme Court explained,

> The Congress when adopting the law was particularly concerned that the issues whether there was employer fault and whether that fault played any part in the injury or death of the employee should be decided by the jury whenever fair-minded men could reach these conclusions on the evidence.

Rogers, 352 U.S. at 508, 77 S.Ct. 443. In other words, the *Rogers* Court found "that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ. . . ." *Id.* at 510, 77 S.Ct. 443.

Prior to *Rogers,* several courts analyzed the issue of causation by distinguishing situations where the defective appliance was "the cause of or the instrumentality through which the injury [was] directly brought about" from instances

where the defect merely was incidental in creating the condition in which the plaintiff was injured. *See, e.g., Reetz*, 46 F.2d at 52. *In Reetz*, a conductor was killed after the train on which he was riding went into an emergency stop due to defective couplers. It was dark at the time, and some of the train's cars stopped on a bridge. The conductor and the train's brakeman began to walk the train in order to identify the cause of the stop and repair any defect. As the conductor walked alongside the cars stopped on the bridge, he fell to his death. The brakeman was on the other side of the train and so he did not see what the conductor was doing when he fell. The trial court directed a verdict for the railroad, finding that the conductor's fall from the bridge was not directly caused by the defective appliance; instead, the defect merely created the condition whereby the conductor happened to be at the place where he was injured. *Id.* at 51-52. Upholding the district court's decision, this court stated:

> [A]t least in those cases where there has been a failure of a required appliance, there is liability only where the failure of the appliance not only creates a condition under which, or an incidental situation in which the employee is injured, but where the defective appliance is itself an efficient cause of or the instrumentality through which the injury is directly brought about.

Id. at 52.

As the district court relied on this incidental situation versus instrumentality distinction to decide the present matter, this court must determine whether *Reetz* still is applicable to decide causation in FSAA cases following *Rogers*. This court has addressed this issue since *Rogers* but not consistently. In some cases the court has applied *Reetz*, in other cases the court has held that *Reetz*' distinction no longer is appropriate. *See, e.g., Hausrath v. New York Cent. R.R. Co.*, 401 F.2d 634 (6th Cir.1968)(relying on *Rogers* and adopting a more relaxed standard of causation than *Reetz*); *Black v. Penn Cent.*

Co., 507 F.2d 269 (6th Cir. 1974)(acknowledging *Rogers*, but relying on *Reetz* to hold that the defective appliance was not a "contributory proximate cause" of the plaintiffs injuries);[3] *Green*, 763 F.2d at 810 (relying on *Reetz* to find that the defective appliance at best only created an incidental condition in which the plaintiff was injured). In none of the cases declining to apply *Reetz*' distinction, however, has the court overruled that decision. Courts in other jurisdictions, however, specifically have rejected *Reetz* in cases similar to the present matter. *See New York, New Haven & Hartford R. Co. v. Leary*, 204 F.2d 461 (1st Cir.1953); *Warning v. Thompson*, 249 S.W.2d 335 (Mo.1952).

Leary presented a factual scenario similar to *Reetz*: *a* conductor, walking alongside a train at night after it went into an emergency stop due to defective air brakes, fell from a bridge on which some of the train's cars had stopped. The trial court denied the railroad's motion for a directed verdict and, after a jury returned a verdict for the plaintiff, motion for judgment notwithstanding the verdict. *Leary*, 204 F.2d at 462. The First Circuit Court of Appeals upheld the lower court's decisions on the motions, concluding that there was sufficient evidence for a jury reasonably to find that the conductor's fall "was within the risk created by the defective air brake." *Id.* at 467. The *Leary* court rejected *Reetz*, finding this court's reasoning "unpersuasive." *Id.* at 466. The court explained:

> Defective brakes create a number of hazards, depending on the circumstances under which they operate. The

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[3] Judge McCree, dissenting on another issue in *Black*, agreed that there was no evidence that the defective appliance was a causal factor in the plaintiffs injury; however citing *Rogers*, Judge McCree noted that it was "unnecessary and erroneous" for the majority to focus on proximate cause. *Black*, 507 F.2d at 272 (McCree, J., dissenting). Judge McCree interpreted *Rogers* as making clear that "in adopting the language 'resulting in whole or in part,' the Congress intended to depart from the language of proximate causation . . ." *Id.*

> danger is not confined merely to the likelihood that a sudden stop or a failure to stop might produce a collision or a severe jolt. In the instant case the danger also consists in the fact that a sudden stop in the night exposed the employees to other hazards. Among these hazards are bad weather, faulty road bends, and an unperceived trestle.

Id. The court reasoned that once the train stopped, it became the conductor's duty to discover and repair whatever caused the stop, and he was injured in his performance of this responsibility. *Id.* at 467. The court concluded that "'Foreseeability does not mean that the precise hazard or the exact consequences which were encountered should have been foreseen.'" *Id.* (quoting James and Perry, *Legal Cause,* 60 Yale L.J. 761, 797 (1951)).

In *Warning*, a railroad engineer was injured while climbing up the front of a locomotive in order to reach and repair part of a defective sanding apparatus. *Warning*, 249 S.W.2d at 337. There was evidence that this was the customary and required method for reaching and fixing the defective part. *Id.* The pilot on the locomotive, however, was wet and the engineer slipped and fell. *Id.* After the jury returned a verdict in favor of the plaintiff, the defendant appealed, arguing in part that the defective appliance was not the proximate cause of the engineer's injuries and that the trial court's instruction on causation was improper. *Id.* at 340.

The trial court in *Warning* had submitted causation to the jury by requiring these findings:

> the failure of the sanders to function "was the cause of plaintiff being where he was when he fell; . . . he fell while getting onto or trying to get onto" the pilot; "he was going up to get to the sand traps to do work to get sand to go out of the sand traps and onto the rails by use of the air valve in the cab"; the failure of the sanding

> apparatus to function and his going up to get to the traps to get the sand to flow subjected him to a peril that would have been unnecessary if, when he used the air valve in the cab, the traps would have functioned.

Id. at 340-41. On appeal, the Missouri Supreme Court held that there was a "direct causal connection between the failure of the sanders to function and plaintiffs injuries, and that the instruction was a proper submission of that issue." *Id.* at 341.

The *Warning* court acknowledged the factual similarity between the case before it and *Reetz* but concluded that the connection between the defective appliance and the plaintiff's injury was not as one-sided as the *Reetz* court concluded. *Id.* Quoting from the Second Circuit Court of Appeals' decision in *Anderson*, a case which also involved a similar factual scenario,[4] the *Warning* court explained:

> Whether in a given case the statutory violation is to be deemed the proximate cause, or merely a condition, of the accident is often a troublesome problem, and it is impossible to harmonize all of the many decisions on the subject. The defendant argues that [the plaintiff's] own act in placing himself in a position of danger where he would be struck by the Erie engine was the proximate cause of his death, and the defect in the sanders only a remote cause or condition of the accident. *But* the jury might reasonably find from the evidence that he had taken this position in an effort to remedy the defect and get the sand to flow . . . and that this conduct was a normal reaction to the stimulus of a situation created by the defendant's violation of its statutory duty.

Id. (quoting *Anderson*, 89 F.2d at 630)(emphasis added). In other words, the *Warning* court concluded, a jury could find

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[4] In *Anderson*, a fireman was struck and killed by a passing engine while bending over to examine the pipes of the train's sanding apparatus which had failed to deliver sand to the rails. *Anderson*, 89 F.2d at 630.

that the "[p]laintiff s presence at the place where he fell was no 'mere occasion,'" as 'his duties required him to be at that place, and his injury was the direct result of the failure of the sanders to function." *Id.* Because the evidence could be interpreted in more than one way, the court concluded that the issue of causation should be decided by the jury.

At least one other court has applied the same rationale to conclude that the issue of causation should have been submitted to the jury in a case factually similar to the one before this court. *See Hendrick v. CSX Transp., Inc.*, 575 So.2d 709 (Fla.Dist.Ct.App.1991). In *Hendrick*, a brakeman was riding on a train that went into an emergency stop after two coupling mechanisms, or "knuckles," broke. *Hendrick*, 575 So.2d at 710. The brakeman was responsible for replacing the broken knuckles. While carrying a new knuckle up the ballasted slope beside the track, the brakeman lost his footing, slipped, and injured his back.

The trial court directed a verdict for the railroad, holding that the broken knuckles merely created the situation to which the brakeman was responding when he was injured. *Id.* at 711. The appellate court reversed, holding that "the trial court erred in focusing on concepts of proximate cause and whether the railroad's negligence merely created a condition or situation to which the employer [sic] was required to respond." *Id.* at 712. The court reasoned that the jury could have found that but for the defective equipment, the brakeman never would have been required to replace the knuckle and been injured. *Id.*

As the *Warning* court noted, determining in a given case whether an alleged defect is the proximate cause or merely a condition of the plaintiffs injury is often a troublesome matter; as a result, courts often reach different conclusions on the issue of causation when faced with factually similar scenarios. Here, applying *Reetz*, the district court concluded that Richards' losing his footing on the ballast was only

incidental to the defect which he was attempting to identify. As other courts have recognized, however, a jury might reasonably have concluded that Richards only was injured because the braking system failed to function properly, it was his duty to identify and remedy the defect, and the proper method for fulfilling his responsibilities was walking the train. *Rogers* makes clear that where the evidence allows more than one outcome on the issue of causation, the issue should be decided by a jury, not a judge. *Rogers*, 352 U.S. at 506-07, 77 S.Ct. 443.

We now join those courts that have rejected *Reetz* in light of *Rogers* and hold that *Reetz* no longer is good law. Courts in FSAA cases (and FELA and BIA cases as well) should focus on whether a reasonable jury could conclude that the defective appliance played *any* part, even the slightest, in bringing about the plaintiff's injury. This means that if a reasonable jury could find that the plaintiff's injury "was within the risk created by" the defective appliance, the plaintiffs right to a jury trial should be preserved. For example, if as a result of a defective appliance a plaintiff is required to take certain actions and he or she is injured while taking those actions, the issue of causation generally should be submitted to a jury.[5]

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[5] Admittedly scenarios will arise where the connection between the defective appliance and the plaintiffs injuries become too attenuated to conclude that the defect caused the injury. Take for example the following scenario: a train goes into an emergency stop due to defective air brakes; and an employee, who has exited the train and is standing next to it merely waiting for the brakes to be repaired, is attacked by a rabid dog. Or the same employee waiting for the defect to be repaired decides to stretch his or her legs, goes for a walk, falls, and is injured. A court reasonably could find no causation as a matter of law in these situations.

III. Conclusion

As the evidence indicates that air brakes only go into an emergency stop due to an actual emergency (which was not present here), application by someone on the train (also absent), or some defect, we find that the trial court erred in holding Richards' testimony insufficient to demonstrate a question of material fact on the issue of whether the appliance was defective. We find that the district court erred in failing to submit the issue of causation to a jury as well. The district court relied on *Reetz* in analyzing the issue of causation; however that case is no longer good law in light of *Rogers*. For these reasons, we REVERSE the judgment of the district court and REMAND for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT, S.D. OHIO
EASTERN DIVISION

No. 2:00-CV-321

HONAS H. RICHARDS,
Plaintiff,

v.

CONSOLIDATED RAIL CORP.,
Defendant.

Sept. 10, 2001

OPINION AND ORDER

SARGUS, District J.

This matter is before the Court on the Defendant's Motion for Summary Judgment. (Doe. # 21). For the reasons that follow, the motion is granted.

I.

Plaintiff, Honas Richards, brings this action against Defendant Consolidated Rail Corp., alleging violations of the Federal Employers' Liability Act ["FELA"], 45 U.S.C. § 51, *et seq.*, the Locomotive Boilers Inspection Act ["LBIA"], 49 U.S.C. § 20701, *et seq.*, and the Federal Safety Appliance Act ["FSAA"], 49 U.S.C. § 2301, *et seq.*, in connection with an incident that occurred while he worked as a conductor for Consolidated Rail. This action was originally filed in the United States District Court for the Eastern District of Pennsylvania and was transferred to this Court by stipulation of the parties. The Court has jurisdiction pursuant to 28 U.S.C. § 1331.

Plaintiff commenced employment with Consolidated Rail 1953; he has worked as a conductor since 1957. On May 1, 1999, Plaintiff was traveling on a freight train, which consisted of approximately ninety cars, from Columbus, Ohio to Cincinnati, Ohio. (*Deposition of Honas Richards*, hereinafter referred to as "*Richards Depo.*" at 10-11; 20). Approximately thirty minutes after leaving the Buckeye Yard in Columbus, the train went into an "emergency" status and came to a complete stop. (*Id.* at 12). According to Richards, the train was traveling at an approximate speed of twenty-five miles an hour. (*Id.* at 13). When the train came to a stop, Plaintiff placed an emergency radio call and exited the train in an attempt to determine the cause of the stop.[1] (*Id.* at 14).

Plaintiff walked along the east side of the track to inspect the train and determine why it had stopped. (*Id.* at 18). Plaintiff walked four or five feet away from the train along the mainline track bed. (*Id.* at 17). As he walked, Plaintiff slipped on ballast on the track bed. Plaintiff did not fall down, however, as he was able to catch himself. Plaintiff describes the incident in the following manner:

> [A]ll at once, as I recall, I planted my right foot and was about to make a step with my left foot and all at once there was nothing under my right foot. And since I was on a severe slope from left to right, high on the left and low on the right, and the weight had been on my right foot and now there's nothing underneath my foot, I had the sensation I was going to fall on top of my head. Just roll over on top of my head. So I just rolled around to square my feet up on that bank.

(*Richards Depo.* at 18). According to Richards, the track bed consisted partly of ballast and partly of dirt. (*Id.*). Upon further questioning, Plaintiff testified that, as he discovered

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[1] In Richards' opinion, the stop was caused by "a defective control valve." (*Id.* at 13).

there was nothing under his right foot, "it was like a lightening bolt went off in the small of my back. . . it felt like I was going to fall on my head. So I whirled, and when I whirled, my back, the lower it hurt so bad that everything felt liquid (sic)." (*Id.* at 19). On deposition, Plaintiff could not recall how it took for the pain to subside. Once his pain subsided, Plaintiff resumed his inspection of the train.

Plaintiff was unable to provide any further details about the incident. He testified that there were no weeds or trees in the area that may have caused him to slip and the area was not wet, or slippery. (*Id.* at 22-23). Plaintiff testified that there were wooden ties "scattered" along the track, but he was able to step around and avoid them. (*Id.* at 23). Plaintiff stated, "[t]here wasn't anything showing above the ground that I stepped on . . . ." (*Id.*). Plaintiff summarized the incident in the following manner: "Now, what happened when everything went to blazes, I don't know because I was only concerned with self-preservation. I will be real truthful." (*Id.*).

In an affidavit attached to his *Memorandum contra* Defendant's Motion for Summary Judgment, Plaintiff avers that his slip was caused as a result of the "road ballast [having] shifted or collapsed." (*Affidavit of Honas Richards* at ¶ 21). Plaintiff further avers that "[h]ad I been walking on yard ballast, my accident would not have happened." (*Id.*). According to Plaintiff, yard ballast is composed of small, tightly packed stones and is intended to be used in areas for walking. (*Id.* at ¶ 13). In contrast, road ballast is composed of larger rocks which shift and collapse more frequently since they are not tightly packed. (*Id.* at ¶ 14). Plaintiff contends in his affidavit that there is no reason, other than cost-effectiveness, for the use of road ballast on the main track. (*Id.* at ¶ 15).

Defendant Consolidated Rail moves for summary judgment on the basis that Plaintiff fails to present evidence on

the essential elements of a claim under FELA, the LBIA, and the FSAA.

II.

The procedure for considering whether summary judgment is appropriate is set forth in Fed.R.Civ.P. 56(c), which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. Kress & Co.*, 398 U.S. 144, 158-159 (1970). Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); see also *Matsushita Electronics Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The Sixth Circuit Court of Appeals has recognized that *Liberty Lobby, Celotex*, and *Matsushita* have effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. *Street v. J. C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir.1989). The court in *Street* identifies a number of important principles in new era summary judgment practice. For example, complex cases and cases involving state of mind issues are not necessarily inappropriate for summary judgment. *Street* at 1479.

In addition, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Id.* (quoting *Matsushita*, 475 U.S. at 586). Moreover, "[t]he trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Id.* That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely on to create a genuine issue of material fact.

III.

A. Plaintiff's FELA Claim

FELA provides a federal cause of action for the employee of a railroad who is injured or killed as a result of the railroad's negligence. 45 U.S.C. § 51.[2] The statute has been "'liberally construed . . . to further Congress' remedial goal' of holding railroads responsible for the physical dangers to which their employees are exposed." *Fonseca v. Consolidated Rail Corp.*, 246 F.3d 585, 588 (6th Cir.2001), quoting *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994). Despite the liberal construction, however, FELA is not interpreted as a workers' compensation statute, *i.e.*, compensation is not payable for injuries that occur in the

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[2] The statute provides:

> Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 51.

absence of the employer's negligence. *Id.* Rather, FELA has been construed so as to require that railroads provide their employees with a reasonably safe workplace. *Adams v. CSX Transp., Inc.*, 899 F.2d 536, 539 (6th Cir.1990).

In order to state a cause of action under FELA, the Plaintiff must establish (1) that he was injured, (2) that the railroad was negligent, and (3) that the railroad's negligence caused, in whole, or in part, plaintiffs alleged injuries. 45 U.S.C. § 51. Thus, in order to prevail on a FELA claim, the Plaintiff must prove the common-law elements of negligence, *i.e.*, duty, breach, foreseeability, causation, and damages. *Adams v. CSX Transp. Co.*, 899 F.2d 536 (6th Cir.1990).

A railway employer breaches its duty to the employee "if [the employer] knew or should have known of a potential hazard in the workplace, and yet failed to exercise reasonable care to inform and protect its employees." *Peyton v. St. Louis Southwestern Ry.*, 962 F.2d 832, 833 (8th Cir.1992). To establish reasonable foreseeability in FELA cases, the Plaintiff must offer proof that the Defendant had actual or constructive knowledge of the defect that caused the injury. *See Barger v. CSX Transportation, Inc.*, 110 F.Supp.2d 648 (S.D.Ohio 2000); *Gallose v. Long Island R.R. Co.*, 878 F.2d 80, 85 (2nd Cir.1989). With respect to causation, the test is whether an employer's actions played any part at all in causing the injury. *Handyman v. Norfolk & Western Railway Co.*, 243 F.3d 255, 259 (6th Cir.2001). Despite this relaxed causation standard, however, if the Plaintiff presents no evidence whatsoever to support an inference of negligence, summary judgment is appropriate. *Lisek v. Norfolk & Western Ry. Co.*, 30 F.3d 823, 832 (7th Cir.1994).

The Defendant in this case moves for summary judgment on the basis that Plaintiff fails to provide any evidence of action or inaction on its part to cause the Plaintiffs injury. As the Defendant points out, its duty is defined by whether it had actual or constructive knowledge of the allegedly unsafe

workplace condition. "[A]n employer is not liable if it has no reasonable way of knowing that a potential hazard exists." *Williams v. National Railroad Passenger Corp.*, 161 F.3d 1059, 1062 (7th Cir.1998). The Plaintiff argues that the presence of large ballast along the track constituted an unsafe work condition because it provided Plaintiff with "poor footing." (*Memorandum contra* at 12). According to Plaintiff, a jury "[could] conclude that the railroad was negligent in not using small ballast throughout its entire [track] system." (*Id.* at 12-13).

Plaintiff's argument is without merit. This Court concludes that Plaintiff may not rely upon the allegations offered in his affidavit to create a genuine issue of material fact. On deposition, Plaintiff was unable to articulate any basis for the cause of his slip as he walked the track on May 1, 1999. In particular, Plaintiff testified: "Now, what happened when everything went to blazes, I don't know because I was only concerned with self-preservation. I will be real truthful." (*Plaintiff's Depo.* at 23). In a later filed affidavit, however, Plaintiff attributed the slip to the "road ballast [having] shifted or collapsed." (*Plaintiff's Affidavit* at ¶ 21 attached to *Memorandum contra*). It is well-settled in this circuit that a party may not defeat summary judgment by filing an affidavit which contradicts earlier testimony given by way of deposition. *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453 (6th Cir.1986).

This case is analogous to the situation presented in *Smith v. Consolidated Rail Corp.*, No. 95-3727,1996 WL 366283 (6th Cir. June 28, 1996). As the Plaintiff herein, the Plaintiff in that case testified on deposition that he did not know what caused him to fall down an embankment as he walked alongside the train following a collision. In a later filed affidavit, the Plaintiff attributed the fall to one of three things—the presence of vegetation, debris or loose ballast. *Id.* at *1. The Sixth Circuit affirmed the decision to grant summary

judgment to the railroad on Plaintiff's FELA claim, concluding that if the Plaintiff "had hypotheses about the cause of his fall, he was required to say so at his deposition when he was specifically questioned on the subject." *Id.* at *4.

This Court similarly concludes that the statements given by Plaintiff in his affidavit cannot create a genuine issue of material fact in this case. First, the statement in the affidavit was given following the deposition. A Plaintiff does not create a genuine issue of material fact through an affidavit if such affidavit contradicts his or her previous deposition testimony, which would otherwise entitle the Defendant to summary judgment. *Reid, supra.* Second, even if the subsequent affidavit is considered, the Plaintiff has not identified any actual or constructive knowledge on the part of the Defendant that the particular section of the track on which Plaintiff was injured was unsafe. Thus, the Defendant is entitled to summary judgment on Plaintiffs FELA claim.[3]

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[3] In its *Reply Memorandum*, the Defendant urges this Court to conclude that Plaintiff is precluded as a matter of law from pursuing a FELA claim based upon the arguably unsafe condition of large ballast found along the mainline track. According to the Defendant, the presence of large ballast comports with the regulations promulgated pursuant to the Federal Railroad Safety Act, 49 U.S.C. § 20101, *et seq.*; specifically, 48 C.F.R. § 213.103, which states that ballast is used to:

> (a) Transmit and distribute the load of the track and railroad equipment to the subgrade;
>
> (b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;
>
> (c) Provide adequate drainage for the track; and
>
> (d) Maintain proper track cross-level, surface and alignment.

The Court notes that, in the context of regulations regarding train speed, some courts have held that FELA claims are precluded when the railroad was in compliance with the FRSA speed regulations. *See Waymire v. Norfolk and Western Railway Co.*, 218 F.3d 773 (7th Cir.2000). At least

B. Plaintiffs Claimed Violations of the LBIA and FSAA

The Defendant also seeks summary judgment to the extent that Plaintiff's FELA claim is premised upon violations of the LBIA and FSAA.

The FSAA requires that railroad carriers equip locomotives with certain safety devices, including brakes, as specified in the statute or in the regulations promulgated thereunder. *See* 49 U.S.C. § 20302. The LBIA prohibits carriers from using locomotives unless "the locomotive or tender and its parts and appurtenances . . . are in proper condition and safe to operate without unnecessary danger of personal injury. . . ." 49 U.S.C. § 20701. These Acts do not, by themselves, confer any right of action on injured employees. Rather, the Acts supplement FELA by "imposing on interstate railroads an absolute and continuing duty to provide safe equipment." *Urie v. Thompson*, 337 U.S. 163, 188 (1949)(internal quotation omitted). A violation of one of the Acts provides "dispense[s], for the purposes of employees' suits, with the necessity of proving that violations of the safety statutes constitute negligence; and making proof of such violations is effective to show negligence as a matter of law." *Id.* at 189. In such a case, the Plaintiff need only prove that his injury resulted in whole or in part from the railroad's violation of the Act. *Crane v. Cedar Rapids & Iowa City Railway Co.*, 395 U.S. 164, 166 (1969).

In this case, the Plaintiff contends that the braking system on the train was defective, causing it to "emergency stop." Plaintiff contends that, but for the defective brakes, he would not have had to walk the track to inspect the train on May 1,

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one court, however, has declined to adopt such analysis in the context of a FELA claim premised upon the safety of ballast. *See Grimes v. Norfolk Southern Railway Co.*, 116 F.Supp.2d 995 (N.D.Ind.2000). This Court expresses no view on the issue in light of its conclusion with respect to Plaintiffs affidavit.

1999 and would not have slipped and injured his back. The Defendant argues that summary judgment is appropriate because Plaintiffs injury is too tenuously related to any alleged deficiency in the braking system.

While it is clear that a railroad may be liable under FELA for injury caused "in whole or in part" from a violation of the FSAA or LBIA, the Court concludes that Plaintiff in this case has failed to come forward with sufficient evidence to establish a genuine issue of material fact that a violation of one of the Acts occurred. Plaintiff simply opined, on deposition, that "[i]t must have been . . . a defective control valve as a kicker." (*Plaintiff's Depo.* at 26). Plaintiff explained that the control valve controls the amount of air that is taken away from the air brake system. (*Id.* at 92). Plaintiff further testified that, based upon his inspection, because he was unable to find any reason for air to escape, he concluded that "a defective control valve or kicker was the only reasonable explanation why the train went into emergency." (*Id.*).

In *Grogg v. Missouri Pacific Railroad Co.*, 841 F.2d 210 (8th Cir.1988), a railroad employee sought recovery under FELA for injuries sustained after the train went into an emergency stop because an air brake hose had separated from one of the cars on the train. The district court had directed a verdict against the Plaintiff because she failed to show a defect in the air braking system so as to amount to a violation of the FSAA. The Eighth Circuit reversed this finding, holding that Plaintiff did not need to show a defect in order to establish a violation of the Act; rather, she had to offer proof that the equipment failed to work properly. *Id.* at 212, citing *Myers v. Reading Co.*, 331 U.S. 477 (1947).

The Plaintiff in *Grogg* was able to offer some evidence that the hose in fact caused the train in that case to go into an emergency stop. In this case, however, Plaintiff comes forward with no proof that it was in fact the control valve that

caused the train to come to an emergency stop on May 1, 1999. Rather, Plaintiff simply opines that it must have been a "defective control valve." When faced with a summary judgment motion, the Plaintiff has the burden to come forward with evidence to support the existence of a genuine issue of material fact. In the absence of some evidence to bolster Plaintiffs assumption that it "must have been" the control valve which caused the train to emergency stop, the Court concludes that no genuine issue of material fact exists to the extent that Plaintiff's FELA claim is premised upon violation of the FSAA or LBIA.

Further, even assuming a violation of the FSAA or LBIA, the Court concludes that Plaintiff has failed to show that his injury was causally linked to the allegedly defective control valve. Although the standard for causation in FELA cases is relaxed, the Sixth Circuit has held that when "'there has been a failure of a required appliance, there is liability only where the . . . defective appliance is itself an efficient cause of or the instrumentality through which the injury is directly brought about.'" *Johnson v. Illinois Central Railroad*, No. 96-5911, 1997 WL 720442 (6th Cir. Nov. 13, 1997), quoting *Reetz v. Chicago & Erie Railroad Co.*, 46 F.2d 50, 52 (6th Cir.1931). Liability does not attach when the injury is only an "incidental condition" of the defective appliance. *Id.*

In *Reetz*, the train on which Plaintiff was a conductor came to an emergency stop due to the failure of couplers and drawbars; part of the train had stopped on a bridge that was not fit for pedestrian travel. Plaintiff walked alongside the train in order to locate the source of the problem. As a result of the lack of adequate pedestrian footing at the bridge area, Plaintiff fell fifteen feet and died from his injuries. The Sixth Circuit concluded that, although Plaintiff would not have been walking along the train line had the train not stopped, the defective couplers and drawbars were not the cause of

Plaintiff injuries and subsequent death. Rather, the fall was an "incidental situation" which bore no relation to the defective appliance. *Reetz*, 46 F.2d at 52.

The Court concludes that, in this case, even assuming a violation of either the FSAA or LBIA, Plaintiffs slip while walking the track was only incidentally caused by the alleged appliance violation; the injury was not the "direct or efficient" cause of any alleged appliance violation. As in *Reetz*, although Plaintiff would not have been walking the track to inspect but for the allegedly defective appliance, his subsequent slip and injury bears too tenuous a connection with the defective appliance so as to give rise to liability.[4] In any event, however, this Court holds that Plaintiff has failed to present evidence to establish a violation of the FSAA or the LBIA. Thus, the Defendant is entitled to summary judgment.

IV.

In light of the foregoing, the Defendant's Motion for Summary Judgment (Doc. # 21) is GRANTED. This action is hereby DISMISSED. The Clerk is DIRECTED to enter Judgment accordingly.

IT IS SO ORDERED.

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[4] The Court rejects Plaintiffs assertion that this case is analogous to *New York Cent. R. Co. v. Brown*, 63 F.2d 657 (6th Cir.1933), in which the Sixth Circuit held that the jury should consider whether a brakeman could recover for injuries sustained from electrical shock which occurred while the plaintiff was reaching for the brake wheel which allegedly malfunctioned. In that case, the injury bore a much closer relationship to the allegedly defective appliance than does Plaintiffs injury in the case at bar.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed Jul 17, 2003]

HONAS H. RICHARDS,
Plaintiff-Appellant,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant-Appellee.

ORDER

BEFORE: MARTIN Chief Judge; ROGERS, Circuit Judge; and EDMUNDS,[1] District Judge.

The court having received a petition for rehearing en banc and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN, CLERK

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[1] Hon. Nancy G. Edmunds, United States District Judge for the Eastern District of Michigan, sitting by designation.

APPENDIX D

FEDERAL EMPLOYERS' LIABILITY ACT (excerpts)

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

(Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.)

45 U.S.C. § 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.)

45 U.S.C. § 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.)

SAFETY APPLIANCE ACT (excerpt)

49 U.S.C. § 20302. General requirements

(a) General.—Except as provided in subsection (c) of this section and section 20303 of this title, a railroad carrier may use or allow to be used on any of its railroad lines—

(1) a vehicle only if it is equipped with—

(A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles;

(B) secure sill steps and efficient hand brakes; and

(C) secure ladders and running boards when required by the Secretary of Transportation, and, if ladders are required, secure handholds or grab irons on its roof at the top of each ladder;

(2) except as otherwise ordered by the Secretary, a vehicle only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles;

(3) a vehicle only if it complies with the standard height of drawbars required by regulations prescribed by the Secretary;

(4) a locomotive only if it is equipped with a power-driving wheel brake and appliances for operating the train-brake system; and

(5) a train only if—

(A) enough of the vehicles in the train are equipped with power or train brakes so that the engineer on the locomotive hauling the train can control the train's speed without the necessity of brake operators using the common hand brakes for that purpose; and

(B) at least 50 percent of the vehicles in the train are equipped with power or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in the train.

* * * *

(Added Pub. L. 103-272, § 1(e), July 5, 1994, 108 Stat. 881.)